



COMMONWEALTH OF KENTUCKY OFFICE OF THE ATTORNEY GENERAL

RUSSELL COLEMAN
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
SUITE 200
FRANKFORT, KY 40601
(502) 696-5300

24-ORD-221

October 11, 2024

In re: Marcus Green/Kentucky Transportation Cabinet

Summary: The Kentucky Transportation Cabinet (“the Cabinet”) did not violate the Open Record Act (“the Act”) when it denied a request for drafts of reports exempt under KRS 61.878(1)(i).

Open Records Decision

Marcus Green (“Appellant”) submitted a request to the Cabinet seeking “[t]he customer service and back office system monthly operations reports for December 2023, and January through April of 2024” regarding the Ohio River Bridges. The Appellant also sought “[t]he Back Office System KPI¹ and Customer Service Center KPI documents for” the same dates. In response, the Cabinet stated that responsive records are exempt under KRS 61.878(1)(i) and (j) because they are preliminary drafts and contain preliminary recommendations in which opinions are expressed. Upon further inquiry, the Cabinet explained that it is “working with the [toll operator] to finalize all required elements of the reports.” The Cabinet also asserted that final agency action had not yet occurred. This appeal followed.

On appeal, the Cabinet maintains the records are exempt under KRS 61.878(1)(i) and (j). KRS 61.878(1)(j) exempts from inspection “[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended.” This exception is distinct from KRS 61.878(1)(i), which exempts from inspection “[p]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency.” The distinction is important because Kentucky courts have held that “investigative materials that were once preliminary in nature lose their exempt status once they are adopted by the agency as part of its action.” *Univ. of Ky. v. Courier-Journal & Louisville Times Co.*, 830 S.W.2d 373, 378 (Ky. 1992). But neither KRS 61.878(1)(i) nor (j) discusses preliminary

¹ “KPI” refers to “Key Performance Indicators.”

“investigative materials.” Rather, KRS 61.878(1)(i) relates to preliminary drafts and notes, which by their very nature are rejected when a final report is approved. In other words, a first draft is not “adopted” when a second draft is written, and the first draft is always exempt under KRS 61.878(1)(i). *See, e.g.*, 21-ORD-089 (agency properly relied on KRS 61.878(1)(i) to deny inspection of the “first draft” of a report that was later adopted).

The Cabinet explains that the responsive records are “subject to an ongoing iterative process between [the tolling operator for the Ohio River Bridges] and the Ohio and Kentucky Transportation agencies which oversee the tolling operator.” In September 2023 the tolling operator was acquired by a separate entity. Since then, the Kentucky and Ohio Transportation agencies “have been negotiating a mutual understanding of the contract reporting criteria and requirements.” Further, the Cabinet explains, new “operational requirements came into effect for the new contractor in November of 2023.” Thus, it says, any “adjustment of KPI and differing interpretations of the underlying data critical for performance measures result in wholesale revisions in the monthly operations reports effectively making the KPI documents, each entire monthly report, and any conclusions preliminary pending final submission and acceptance by the state agencies.”²

After the appeal was initiated, in a communication including the Appellant and the Office, the Cabinet gave further detail regarding the “ongoing iterative process.” To start, the tolling operator submits draft reports to the Cabinet. The Cabinet then reviews the draft reports and suggests “revisions consistent with [its] interpretation of the contract for services.” The tolling operator and Cabinet then agree on which revisions will ultimately be made.³ Once the revisions are made, “final agency action” occurs when the Cabinet issues the monthly reports with the agreed upon revisions.

Relevant here is the Office’s decision in 21-ORD-089. There, the Office concluded that a draft report submitted to a public agency “with the understanding that revisions were likely and . . . [it] would not be [the] final product” was a “preliminary draft” exempt from inspection under the plain language of KRS 61.878(1)(i). Here, the Cabinet has explained that it and its new tolling operator are continuing to negotiate “a mutual understanding” of their contract’s “reporting criteria” and new operational requirements. As part of this negotiation, the tolling operator submits draft reports to the Cabinet, which are revised and returned to the

² The Cabinet has made the records available to the Office for review under KRS 61.880(2)(c). Because the Office requested further substantiation from the Cabinet under KRS 61.880(2)(c), the records will not be disclosed by the Office pursuant to that subsection.

³ The Cabinet has provided examples of the types of revisions made in responsive materials for December 2023, January 2024, and February 2024. These revisions include style changes, changes to wording to make reported data more accurate, inclusions of omitted data, and retrospective adjustments to collected data.

tolling operator, and only issued by the Cabinet after the proposed revisions are agreed upon and incorporated into the report. Thus, the requested monthly reports are preliminary drafts exempt from inspection until they are issued by the Cabinet. Upon issuance, the reports have been adopted as part of its final action and are subject to inspection. *See Univ. of Ky.*, 830 S.W.2d at 378. Accordingly, the Cabinet did not violate the Act when it denied a request for monthly reports that were still undergoing revisions and had not yet been issued by the Cabinet.⁴

A party aggrieved by this decision may appeal it by initiating an action in the appropriate circuit court under KRS 61.880(5) and KRS 61.882 within 30 days from the date of this decision. Under KRS 61.880(3), the Attorney General shall be notified of any action in circuit court, but shall not be named as a party in that action or in any subsequent proceedings. The Attorney General will accept notice of the complaint emailed to OAGAppeals@ky.gov.

Russell Coleman
Attorney General

/s/ Zachary M. Zimmerer
Zachary M. Zimmerer
Assistant Attorney General

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Distributed to:

Marcus Green
Todd Shipp
Jesse Rowe

⁴ Because KRS 61.878(1)(i) is dispositive of the issues on appeal, it is unnecessary to address the Cabinet's alternative argument under KRS 61.878(1)(j).